U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue Date: 08 February 2005

CASE NO.: 2003-LHC-02542

OWCP NO.: 14-135722

In the Matter of:

DONALD RUDER,
Claimant,

vs.

TODD SHIPYARD CORP.,
Employer,

EAGLE PACIFIC INSURANCE,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party in Interest.

Appearances: Nicole Hanousek, Esquire,
For the Claimant

Russell Metz, Esquire,
For the Employer/Carrier

Matthew Vadnal, Esquire,
For the Director

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS AND SECTION 8(f) RELIEF

INTRODUCTION

This is an action filed by Donald Ruder, the Claimant, for benefits under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §§ 901 *et seq*. for an injury he sustained

while working for Todd Shipyard Corporation, the Employer. It was initiated with the Office of Administrative Law Judges ("OALJ") on August 14, 2003, when it was referred to the OALJ for formal hearing by the District Director of the Office of Workers' Compensation Programs.

For the reasons set forth below, the Claimant is awarded permanent partial disability benefits, and Respondents are granted Section 8(f) relief.

PROCEDURAL BACKGROUND

This matter was heard in Seattle, Washington, on June 9, 2004. The Claimant and counsel for all parties appeared and participated in the hearing. At the hearing, ALJ Exhibits ("ALJ") 1-4 were admitted, as were Claimant's exhibits ("CX") 1-21 and 23-28, and Respondents' exhibits ("EX") 1-7 and 9. Claimant's exhibit 22 and Respondents' exhibit 8 were excluded. After the hearing was concluded, the Director, the Claimant, and Respondents submitted post-hearings statements which were received on June 22, August 10 and August 12, 2004, respectively.

ANALYSIS AND FINDINGS

Issues

The issues to be decided in this case include the following:

1. What is the nature and extent of the Claimant's disability?
2. Is the Claimant able to perform his former work or alternative employment?
3. What was the Claimant's average weekly wage?
4. Is the Claimant entitled to Section 14(e) penalties?
5. Is the Employer entitled to Section 8(f) relief?

Factual Background

The Claimant was born in 1940. (HT[1], p. 86.) He joined the Marine Corps after completing the 11th grade and obtained his GED while serving in the Marine Corps. (HT, p. 86.) After leaving the service in 1971, he started working for an auto parts company, driving a mobile brake service van, turning brake drums and rotors and selling auto parts. In 1974, he completed an apprenticeship through the Oregon State Apprenticeship Council for an auto parts counterman position. (HT, pp. 86-7.) In 1974, he briefly worked as a dock worker for a trucking line, but was laid off after 90 days and returned to his auto parts job, where he stayed until 1978. (HT, p. 87.) He started working for Todd Shipyards as a sheetmetal mechanic in October 1978, but left the shipyards for a period of about 3 ½ years from 1984 to January 1988 when he worked in auto parts. (HT, pp. 88, 87.) After 1988, he returned to ship building work, but had auto parts jobs in between his shipbuilding jobs. (HT, p. 87.)

As a sheetmetal mechanic, the Claimant worked on new construction and repair of ships. When he worked on new construction, he helped build the insides of ship compartments that had been built by the steel department. When doing repair work, he would remove the item or

[1] References to "HT" are to the hearing transcript.

equipment being repaired, recondition the compartment, and then install the new furniture, galley or bathroom that he was working on. (HT, p. 88.) Though he occasionally worked in a machine shop to use a shop-related piece of equipment for something he was working on, his work was done on ships. As a sheetmetal mechanic on ships, his responsibility was basically to install all the living spaces on the ships, including bathrooms, galleys, bunks, lockers, storerooms, doors, etc. (HT, p. 89.) The size and weight of the equipment and materials he worked with varied drastically and could range from a small item, such as a soap dispensers, to large item, such as a 400 pound lead-lined insulated door, depending on what he was installing. (HT, pp. 90-1.) The work was similar to building the interior of a house, but the interior was placed on board a ship. (HT, p. 90.) To do his work, the Claimant carried a tool box weighing about 50 pounds that held the tools he needed. (HT, p. 93.)

On Friday, April 27, 2001, the Claimant was working in Bremerton, Washington, on the aircraft carrier *Lincoln*. He and another sheetmetal mechanic were taken by his supervisor, Vince Wood, to the fan room on the *Lincoln*, and instructed to disassemble the vent and to cut it into pieces small enough to go through the doorway. They began the assignment at 7:30 a.m. At lunch time, the other sheetmetal mechanic was reassigned to work on the *USS Carl Vinson* which was at a different pier. While he was working on his assignment by himself, the Claimant had to remove a large vent that could only be moved straight up. He used a tool called a "hook scraper" to pry loose the piece of ventilation and lift it straight up. As he reached out to pull the piece up, he felt a sharp pain in his back and thought that he had pulled a muscle. He reported the injury to his supervisor when his supervisor returned. (HT, pp. 92-6.) The Claimant did not seek immediate medical care. When he returned to work the following week and found that he was still experiencing pain, he told his supervisor that he had to see a doctor. He went to an occupational medical clinic in Kent, Washington, on May 2, 2001, where he was examined and treated by Dr. Elmer Casey. (HT, p. 97.) He filed a report of occupational injury on the same day, stating that he pulled a muscle or pinched a nerve near his left shoulder blade on April 27, 2001. (CX 1, p. 2.)

The Claimant complained to Dr. Casey of constant left side upper back pain that he rated 5 out of 10 on a pain scale of 1 to 10. Dr. Casey diagnosed the Claimant as suffering from a cervical sprain with muscle spasms in his left shoulder blade. He recommended physical therapy and prescribed Vicodin, Flexeril, and Naprosyn. Dr. Casey released the Claimant to work from May 3-10, 2001, but imposed a 30 pound lifting, pushing and pulling restriction. (CX 20, p. 242.)

On May 4, 2001, the Claimant was examined by Dr. Morley Slutsky with MultiCare HealthWorks-Kent in Kent, Washington. The Claimant reported that none of the medication he had been given by Dr. Casey was working and that the physical therapy he had received twice had aggravated his left shoulder even more. He described his pain level as 7-8 out of 10 and said he was having difficulty sleeping. Dr. Slutsky diagnosed the Claimant as suffering from a sprain in the thoracic region and neck. He prescribed Valium and released the Claimant to return to full duty with no restrictions. (CX 19.)

On May 10, 2001, the Claimant saw Dr. Casey again and reported that he had frequent back pain at a 6-8 level. He described the pain as frequent, stabbing, radiating, and worse at the end of the day and at night. He informed Dr. Casey that the pain limited his upper back range of

motion and made him unable to sleep at night. Dr. Casey prescribed Vicodin, Robaxin, Valium, Naprosyn, and Flexeril for the Claimant. (CX 20, p. 234.) Dr. Casey found during his physical examination of the Claimant that his thoracic back range of motion was mildly decreased in all areas due to pain. (CX 20, p. 235.) After examining the Claimant, Dr. Casey recommended that he continue with his physical therapy but he could return to work from May 10 to 17, 2001, with restrictions. (CX 20, pp. 233, 241.)

On May 17, 2001, Dr. Casey re-examined the Claimant. During the examination, the Claimant reported that his pain was 7-9 on a pain scale of 10 and limited his mid-back range of motion. He described his pain as continuous, dull, aching, cramping, and causing spasms and stiffness. The Claimant also reported to Dr. Casey that he was working full time on full duty and was having increased pain during the work day. He stated that his physical therapy was not improving his condition. (CX 20, p. 232.) Dr. Casey ordered the Claimant not to return to work from May 17, 2001, to May 29, 2001, or until he was seen for back injections. (CX 20, p. 231.)

On May 23, 2001, the Claimant was evaluated by Dr. Kaya Hasanoglu, a specialist in physical medicine and electrodiagnosis, at the request of Dr. Casey. At the examination, the Claimant reported that he had some arm pain on the left side with numbness and tingling sensations of the fourth and fifth digits, and that the symptoms had not improved with physical therapy. The Claimant rated the pain 4 to 8 out of 10 and reported that he was having difficulty dealing with it. He also reported that he had been on light duty, but the light duty had exacerbated his symptoms. At the conclusion of the examination, Dr. Hasanoglu reported that the Claimant had neck and left upper extremity pain which Dr. Hasanoglu felt was due to left upper extremity cervical radiculopathy caused by a C8 nerve root impingement. Dr. Hasanoglu suggested electrodiagnostic studies and prescribed Vioxx, Zanaflex, and Neurontin. Dr. Hasanoglu also prescribed Vicodin to be taken as needed. Dr. Hasanoglu extended the Claimant's off work status until June 1, 2001. (CX 12, pp. 164-66.)

On June 1, 2001, the Claimant was re-examined by Dr. Hasanoglu, who performed the electrodiagnostic studies he had suggested in May. At the time of the examination, the Claimant complained of neck pain, along with left upper extremity pain, numbness and tingling sensations. During the examination, Dr. Hasanoglu found the Claimant's neck range of motion to be within functional limits and sensation to be decreased through the first and second digits to light touch on the left side. Dr. Hasanoglu reported that the electrodiagnostic studies were abnormal and consistent with left upper extremity cervical radiculopathy and that the distribution of the abnormalities found was most suggestive of left C8 radiculopathy. Dr. Hasanoglu also found evidence of left-sided moderate carpal tunnel syndrome with involvement of both motor and sensory fibers. (CX 8.)

On August 20, 2001, the Claimant underwent an independent medical evaluation ("IME") with Dr. Lewis Almaraz, a neurologist, and Dr. Kenneth Briggs, an orthopedic surgeon, at the request of the Carrier. The Claimant reported to Drs. Almaraz and Briggs that he had pain in his upper back just to the left of midline at about the T3 level and that extreme motions with his head and neck, such as bending forward, pulled on the same muscles and aggravated the pain. He also reported that he had no extremity pain but had pain on occasion in the underside area of his left upper extremity down to the elbow if he bent his head forward or turned his head and

neck sufficiently to cause the back pain. He also complained of constant numbness and tingling in the fourth and fifth digits of his left hand.

Drs. Almaraz and Briggs diagnosed the Claimant as suffering from cervical radiculopathy caused by his industrial injury, peripheral neuropathy caused by his chronic alcohol intake, and chronic cervical spondylosis that pre-existed the industrial injury. Both doctors reported that their objective findings showed definite neurologic deficits in the Claimant's left upper extremity and slight decreased range of motion in his cervical spine that was consistent with cervical degenerative disk disease. They expressed the opinion that the Claimant had not reached maximum medical improvement and that he was capable of performing sedentary to light work. They also expressed the opinion that the Claimant's April 27, 2001, injury aggravated his pre-existing cervical spondylosis, but they were not sure if there was peripheral neuropathy and ordered additional electromyographic studies. (CX 21, pp 251-57.)

On August 21, 2001, the Claimant underwent an EMG/Nerve Conduction Study with Dr. Judith Ing-Higashi. Dr. Ing-Higashi reported that her findings were consistent with a left C8-T1 anterior motor ramus irritation and that there was probable peripheral neuropathy. She also reported that she could not rule out a superimposed left carpal tunnel syndrome. (CX 7.)

The Claimant was referred for a cervical spine MRI which was conducted on August 22, 2001, by Dr. Christopher Kottra. Dr. Kottra reported that the results showed no significant interval change when compared to an MRI that was done on November 22, 1999.[2] He did report moderate right foraminal stenosis due to facet and uncovertebral hypertrophy at C4-5, a mild circumferential disc bulge at C5-6, a moderate broad posterior central disc protrusion and left foraminal entry zone disc protrusion at C6-7 and a small left foraminal entry zone disc protrusion at C7-T1. (CX 9.)

On September 5, 2001, Dr. Almaraz prepared an addendum to his IME report after reviewing Dr. Ing-Higashi's EMG results. He reported in the addendum that the EMG results were consistent with a left C8-T1 anterior motor ramus irritation and probable peripheral neuropathy and that the findings were consistent with a C8 –T1 radiculopathy. He expressed the opinion that the Claimant's condition was not fixed and stable and that he should return to his treating physician for evaluation of his cervical radiculopathy and peripheral neuropathy. He also expressed the opinion that the Claimant's peripheral neuropathy was not related to his industrial injury. (CX 21, pp. 249-50.)

Dr. Hasanoglu referred the Claimant to Dr. Mark Remington, a Board certified orthopedic surgeon who specialized in spines. Dr. Remington examined the Claimant on October 1, 2001, for his shoulder and left upper extremity pain complaints (Remington[3] Depo, CX 25A, p. 6-7.) Dr. Remington recommended a myelogram and a CT-scan. On October 15, 2001, the Claimant underwent a CT scan. Dr. Elliott Sacks, who evaluated the results, reported that the Claimant had generalized degenerative cervical spondylosis, severe right C5 neuroforaminal encroachment, mild left and minimal right C6 neuroforaminal encroachment,

[2] The November 22, 1999, MRI report, prepared by Dr. Shane Macaulay, is CX 10.

[3] Dr. Remington was deposed twice. The transcript of his first deposition, taken on February 5, 2004, was admitted as CX 25A. His second deposition was taken on May 4, 2004, and that transcript was admitted as CX 25B. For the sake of brevity, references to his deposition transcripts will be referred to only by exhibit number and page.

mild left C7 neuroforaminal encroachment, moderately severe left C8 neuroforaminal encroachment and non focal disc herniation or significant spinal canal stenosis. (CX 14.) After reviewing the CT results, Dr. Remington concluded that they showed a compression of the left C-8 nerve root, which was consistent with his symptoms. (CX 25A, p. 8.) He diagnosed the Claimant as suffering from C7-T1 spondylosis radiculopathy and suggested surgery, an anterior cervical discectomy and fusion, for the Claimant. (CX 11, p. 79; CX 25A, pp. 8-9.)

During a pre-operative examination conducted on November 8, 2001, the Claimant reported to Dr. John Henn, the examining doctor, that he had a "pretty sore neck." Dr. Henn found that the Claimant had a decreased range of motion in his neck. (CX 17, pp. 202-3.)

On November 27, 2001, Dr. Remington reported that the Claimant should be excused from work until December 17, 2001, because he was scheduled for surgery on November 28, 2001, and would need three weeks for post-operative recovery. (CX 11, p. 70.) On November 28, 2001, Dr. Remington performed a cervical anterior discectomy and surgical fusion at the C7-T1 level on the Claimant. (CX 11.)

On January 3, 2002, in his first postoperative visit after his surgery, the Claimant reported to Dr. Remington that his radicular pain resolved nearly immediately after the surgery and that his major pain symptoms had resolved. He reported occasional discomfort in his neck posteriorly. Dr. Remington recommended that the Claimant see a physical therapist to work on a strengthening program. He reported that the Claimant may eventually be able to return to his job as an electrician[4] but that he would have restrictions in terms of overhead work. (CX 11, p. 67.)

Dr. Remington saw the Claimant again on March 8, 2002, in a follow-up visit. At that time, the Claimant reported that he still had an ache in his posterior neck in the morning but attributed it to rotating his head because he sleeps on his stomach. The Claimant reported that while the neck discomfort was there most of the time, it was not really a limitation. The Claimant continued to report numbness on the ulnar border of his hand and small finger. Dr. Remington expressed the opinion that the Claimant could return to a light duty position. He released the Claimant to return to work but restricted him from lifting more than 30 pounds, repetitive neck turning, and limited overhead work. (CX 11, pp. 64-5; CX 25A, p. 11.)

The Claimant returned to work at Todd Shipyard as a supervisor. (HT, p. 105.) His duties as a supervisor required him to oversee the work performed by his crew. He first worked on the *USS Sacramento* in Seattle. (HT, p. 107.) The work on the *Sacramento* was on one deck and did not require him to move to other decks or climb through hatches. (HT, p. 108.)

On May 13, 2002, the Claimant saw Dr. Remington again and reported some persistent symptoms. He reported paresthesias on the ulnar border of his hand and ring finger on the left but stated that, overall, he was very pleased with the outcome of his surgery because it had basically eliminated the discomfort he had before the surgery. The Claimant's x-rays showed no significant change. The Claimant did not report any problems caused by his work. Dr. Remington expressed the opinion that the Claimant has a long-term restriction of no overhead work. (CX 11, p. 63.)

[4] Though Dr. Remington understood the physical demands of the Claimant's work, he appears to have been under the mistaken impression that the Claimant was an electrician instead of a sheetmetal mechanic.

In May 2002, the Claimant completed his assignment on the *Sacramento* and was reassigned to the aircraft carrier *USS Carl Vinson* in Bremerton, Washington. (HT, p. 106.) While working on the *Carl Vinson*, the Claimant, who is 6 feet high (HT, p. 91), had to frequently walk through "arch combings" which were only 56 to 58 inches tall, forcing him to frequently bend his head. He often banged his head on the openings. (HT, p. 107.) The work on the *Carl Vinson* required him to walk on four different levels and about 2/3 of the ship. (HT, p. 109.) After about a month on this assignment, his neck started bothering him. (HT, p. 106.) He reported these problems to Dr. Remington on June 6, 2002.

Dr. Remington noted in his clinical notes of the June 6, 2002, examination that the Claimant was struggling but continuing to work and that though the Claimant remained in a supervisory position, the work was on board an aircraft carrier, which required a lot of ducking, bending and banging his head multiple times during the day. (CX 11, p. 61.) The Claimant reported generalized discomfort and neck pain. After examining the Claimant, Dr. Remington opined that the Claimant has limitations and cannot tolerate the demands of his supervisory position because of the ducking, bending and moving in awkward positions required. He said that the Claimant was basically fixed and stable. Dr. Remington expressed doubt that the Claimant could return to an active supervisory position and suggested retraining, as well as a trial of an anti-inflammatory and returning to therapy to work on a general strengthening program. Dr. Remington took the Claimant off work until after his independent medical examination was completed. (CX 11, pp. 61-2; EX 3.)

On June 17, 2002, Drs. Almaraz and Briggs conducted another independent medical examination of the Claimant for the Carrier. At that examination, the Claimant reported that the pain in his left upper extremity subsided almost immediately after the surgery and had not returned. He reported that he was undergoing physical therapy to regain his strength and expressed the opinion that he had regained most of it. However, he still complained of some minor persistent and continuous numbness over the ulnar side of his left hand but said it did not interfere with his activities of daily living. At the conclusion of this examination, Drs. Almaraz and Briggs concluded that the Claimant suffered from cervical spondylosis that pre-existed the industrial injury, a C7-T1 disk herniation and left upper extremity radiculopathy that, on a more probable than not basis, resulted from the industrial injury. In response to specific questions, they expressed the opinion that the Claimant's condition was fixed and stable and that his current condition was related to the April 27, 2001, injury. They also expressed the opinion that the Claimant could return to a light-duty supervisory position and that the problems he had as a supervisor resulted not from the work requirements, but the work environment because he had to constantly flex and extend his neck while going in and out of confined spaces. They recommended an environment where that would not be required. They also limited him to lifting 21-50 pounds occasionally; no lifting over 50 pounds; occasional pulling/pushing of 11-20 pounds; no pulling/pushing over 20 pounds; occasional climbing; occasional reaching; and no repetitive flexion and extension of his neck. (CX 21, pp. 259-266.)

On December 11, 2002, the Claimant was referred for a physical capacities evaluation ("PCE") by his counsel. The PCE was conducted on January 7, 2003, by Christina Casady, a registered occupational therapist. After performing the PCE, Ms. Casady reported that the Claimant's work site tolerances were consistent with a medium physical demand level on a reasonably continuous basis and that, specifically, he could lift and carry 48 pounds occasionally

and 30-42 pounds frequently. She observed that the Claimant's range of motion for his neck and low back were below normal limits, as was his left wrist radial deviation. (CX 28.) She found that he could only occasionally reach overhead with weights of 48 pounds and could only occasionally bend or stoop. Dr. Remington agreed with the PCE limitations and found them similar to the restrictions imposed following the June 17, 2002, IME, though he found the IME restrictions to be more detailed. On May 20, 2003, Dr. Remington noted, in response to questions from the Claimant's counsel, that he agreed with the physical restrictions imposed on the Claimant by Drs. Almaraz and Brigg after their second IME. (CX 11, p. 60; CX 25A, p. 12.)

The Claimant returned to work on June 4, 2003,[5] when he was assigned to do quality control work on the *USS Abraham Lincoln* under Kenneth Hanbaum, an assistant foreman. (Hanbaum Depo[6], p. 7; HT, p. 110.) The Claimant's responsibilities were to check the quality of government-furnished materials, check the quality of the product produced by the sheet metal shop, inventory the sheet metal shop product, make sure the sheet metal shop product was moved from the warehouse to the ship, and make sure that necessary materials were available. (CX 26, p. 7.) This work was initially performed in a warehouse. (HT, p. 108.) After the warehouse work was completed, the Claimant had to go aboard ship to inspect the work completed by the mechanics to make sure that the work complied with the specifications and drawings. (HT, p. 108.) The shipboard work required him to crawl on his hands and knees and look underneath equipment to inspect the completed work. (HT, p. 109.)

Dr. Remington saw the Claimant again on November 10, 2003. At that time, the Claimant reported increasing symptoms the preceding week, explaining that he "does better" when he is not on a ship and that as the work progresses onto a ship, he is forced to do a lot of ducking and moving through tight spaces, causing increased neck pain. The Claimant reported that he had a fairly severe episode of neck pain during the preceding week. He was taking non-prescription anti-inflammatories for his pain. Dr. Remington reported that the Claimant should have limitations of no repetitive bending and suggested a trial of Celebrex. (CX 11, p. 59.) The Claimant worked as a quality control inspector on the *Abraham Lincoln* until February 20, 2004, when he was laid off. (HT p. 112.)

In response to written questions presented to him by the Claimant's counsel on January 21, 2004, Dr. Remington stated that he agreed with the restrictions outlined in Ms. Casady's January 7, 2003, physical capacities evaluation but added that he would impose an additional restriction of no repetitive neck flexion/extension, as stated in the IME, and limit the frequency of stooping to seldom. Dr. Remington also stated that the Claimant reached maximum medical improvement regarding his neck condition on June 6, 2002, and reaffirmed his opinion that the Claimant cannot tolerate the physical demands of his sheetmetal mechanic position. (CX 11, pp. 55-7.)

---

[5] The Claimant and Mr. Hanbaum disagree about the precise date that the Claimant started working in quality control. The Claimant testified that he started June 4, 2003, HT, p. 110, while Mr. Hanbaum testified that he started May 20, 2003. Respondents' indicate in their pre-trial statement, ALJ Ex. 3, and their LS-208, EX 1, that they stopped paying permanent partial benefits June 4, 2003. Thus, it appears that the Claimant returned to work on June 4, 2003.

[6] Mr. Hanbaum's deposition was admitted into evidence as CX 26. Future references to the deposition will be to CX 26.

When there was no more work within the Claimant's medical restrictions available on the *Abraham Lincoln*, James Jackson, the Claimant's foreman, instructed Mr. Hanbaum to lay off the Claimant. Mr. Hanbaum consulted with Mr. Jackson and the Employer's human resources director before preparing the layoff notice. (Jackson Depo[7], p. 10.) The Claimant was laid off from this job on February 20, 2004. At the time that Mr. Hanbaum laid off the Claimant, he gave him an Employee Status slip that indicated that the Claimant was being laid off effective February 20, 2004, because of an "inability to perform duties due to industrial injury." (CX 5, p. 35; Exhibit 1 of CX 26.) At the time the Claimant was laid off, work was still available, but the remaining work on the boat was beyond the Claimant's physical restrictions because it required crawling around tight spaces, which the Claimant was unable to do. (CX 27, p. 12.) On February 20, 2004, the Claimant had enough seniority so that if he had been able to work on the *Abraham Lincoln*, he would not have been laid off. (CX 26, p. 9.) Patty Majolick, a less senior quality control employee, who could perform the work, continued to work after the Claimant was laid off. (CX 26, pp. 13-14; CX 27, p. 11.)

In 2004, the Employer referred the Claimant to Dr. Aleksandra Zietak for an independent medical examination. Dr. Zietak is board certified in physical medicine rehabilitation. She examined the Claimant on February 26, 2004. (HT, p. 44.) The Claimant reported to Dr. Zietak that he had a steady aching in his upper thoracic area in the midline and a prickly sensation in his left little finger. He described his neck pain as a "dull ache" and rated his neck pain as a 2 on a scale of 1 to 10. He also reported to her that he got a sharp pain when he drove and turned his head to check traffic and that when he reaches a certain point, he had to turn his shoulder instead of his head. He also reported that his left hand cramped easily. He informed her that lifting and overhead work bothered his neck and that he got pain through his neck and shoulders if he raised his arms above his shoulders for any period of time. (EX 2, pp. 3-4)

Dr. Zietak prepared a report, EX 2, on February 26, 2004, in which she concluded that the Claimant had reached maximum medical improvement and was able to resume the mechanic and supervisory job he was doing at the time of his work injury without restrictions. She imposed no restrictions on his physical activity but mentioned that Dr. Remington's recommendation of a 50 pound lifting restriction was reasonable for a patient who had undergone a spinal fusion. (EX 2, p. 10.)

The Employer's job description for the Shipboard and Shop Sheetmetal Mechanic position that the Claimant held lists the following physical requirements: the ability to occasionally lift an average of 65 pounds, and as much as 120 pounds, from floor to bench to floor; the ability to frequently lift an average of 20 pounds and as much as 50 pounds from bench to overhead to bench; the ability to occasionally carry tool boxes that weigh an average of 65 pounds but as much as 120 pounds; an average of 2 hours and a maximum of 6 hours of overhead reaching; and frequent bending, crouching and squatting. (CX 6.)

[7] Mr. Jackson's deposition was admitted as CX 27. Future references to the deposition will be to CX 27.

The Nature and Extent of the Claimant's Disability

The Nature of the Claimant's Disability

The Act defines disability as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, a claimant must demonstrate an economic loss in conjunction with a physical or psychological impairment in order to receive a disability award. *See Sproull v. Stevedoring Service of America,* 25 BRBS 100, 110 (1991); *see also Del Vacchio v. Sun Shipbuilding & Dry Dock Co.,* 16 BRBS 190 (1984).

Disability is generally addressed in terms of whether its nature is permanent or temporary and whether its extent is partial or total. *See Stevens v. Director, OWCP,* 909 F.2d 1256, 1259 (9th Cir. 1990), *cert. denied,* 498 U.S. 1073, 111 S.Ct. 798, 112 L.Ed.2d 860 (1991); *see also Louisiana Insurance Guaranty Association v. Abbott,* 40 F.3d 122, 125, 29 BRBS 22, 24 (CRT) (5th Cir. 1994). However, before determining the nature and extent of the Claimant's disability, the Claimant's disability itself must first be identified.

It is clear from the diagnoses provided by Drs. Hasanoglu, Almaraz, Sachs, and Remington, that the Claimant suffered a left upper extremity cervical radiculopathy as a result of his injury on April 27, 2001. Dr. Hasanoglu first diagnosed the Claimant on May 23, 2001, as suffering from a left upper extremity cervical radiculopathy caused by a C8 nerve root impingement. Dr. Hasanoglu confirmed that diagnosis on June 1, 2001, after conducting electrodiagnostic studies of the Claimant. Drs. Almaraz and Buggs, who examined the Claimant on August 20, 2001, at the request of the carrier, agreed that the Claimant suffered from cervical radiculopathy and chronic cervical spondylosis. They expressed some uncertainty about whether the Claimant also suffered from peripheral neuropathy. However, after the Claimant underwent EMG testing with Dr. Ing-Higashi, Dr. Almaraz concluded that the Claimant did suffer from peripheral neuropathy, though it was not related to his industrial injury.

Dr. Remington, who examined the Claimant on October 1, 2001, at the request of Dr. Hasanoglu, diagnosed the Claimant as suffering from C7-T1 spondylosis radiculopathy and recommended a CT scan. Dr. Sacks, who evaluated the CT scan results, reported results consistent with Dr. Remington's diagnosis. Dr. Remington performed a cervical anterior discectomy and surgical fusion on the Claimant on November 28, 2001, to relieve the Claimant's symptoms. After re-examining the Claimant on June 17, 2001, Drs. Almaraz and Briggs again diagnosed the Claimant as suffering from cervical spondylosis and left upper extremity radiculopathy as a result of his April 27, 2001, injury.

Thus, I find the Claimant suffers from cervical spondylosis and left upper extremity radiculopathy.

The Claimant Has Reached Maximum Medical Improvement

The traditional method for determining whether an injury is permanent or temporary is by identifying the date of maximum medical improvement ("MMI"). *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.,* 17 BRBS 56, 60 (1985). A disability suffered by a claimant before reaching maximum

medical improvement is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984).

In this case, the parties stipulated that the Claimant reached maximum medical improvement on June 6, 2002. (HT, p. 22.) Since the Claimant has reached maximum medical improvement, I find that the Claimant's condition became permanent on June 6, 2002.

The Scope of the Claimant's Disability

While the parties agree that the Claimant has reached maximum medical improvement, they disagree about the scope of his injury and the extent of the limitations the Claimant's injury places on his physical activities.

Respondents had the Claimant examined by Dr. Zietak in 2004. She diagnosed the Claimant as suffering from a cervicothoracic strain and pre-existing cervical spondylosis but concluded that he was able to resume the sheet metal mechanic and supervisory duties he was performing at the time of his injury with no restrictions, though she did acknowledge that a 50-pound lifting limit was not unreasonable because of his surgery.

In contrast, on January 21, 2004, Dr. Remington, the Claimant's treating physician, expressed the opinion that the Claimant could not tolerate the physical demands of his sheetmetal worker position. (CX 11, p. 56.) He expressed agreement with the limitations imposed by Ms. Casady following her physical capacities evaluation, as well as the limitations recommended by Drs. Almaraz and Briggs, who both evaluated the Claimant after he reached maximum medical improvement. Doctors Remington, Almaraz and Briggs put limitations on the Claimant's ability to work in an environment where he had to flex and extend his neck while going in and out of confined spaces and limited him to occasional reaching and occasional bending and stooping with no repetitive flexion and extension of his neck.

The Ninth Circuit held in *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), (order revised at 164 F.3d 480 (9th Cir. 1999)), that a treating physician's opinion is entitled to substantial weight. In a recent decision, *Peabody Coal Co. v. Director*, 342 F.3d 486, (6th Cir. 2003), the Sixth Circuit added that although treating physicians get the deference they deserve based on their power to persuade, "a highly qualified treating physician who has lengthy experience with a [patient] may deserve tremendous deference…" *Id.* (quoting *Eastover Mining Co. v. Williams*, 338 F.3d 501 (6th Cir. 2003)) Dr. Remington was the Claimant's treating physician, and unlike Dr. Zietak, whose specialization is physical medicine rehabilitation, Dr. Remington specializes in spine surgery, and the majority of his practice involves the cervical and lumbar spine. (CX 25A, p. 6.) Dr. Zietak's opinion was based on one examination of the Claimant. In light of his status as the Claimant's treating physician and the relationship between his specialization and the Claimant's medical condition, Dr. Remington's opinion is entitled to more deference than Dr. Zietak's.

Also, though Dr. Zietak's examination was the most recent one, I do not find her evaluation persuasive since Drs. Remington, Almaraz and Briggs, who are all in agreement, all examined the Claimant after he reached maximum medical improvement, and there is no

evidence that the Claimant's condition changed between their examinations and Dr. Zietak's examination.

I also find that the limitations on the Claimant's physical activity are those identified by Drs. Almaraz and Briggs following their second IME examination. Dr. Remington agreed with their limitations, which differ only slightly from those recommended by Ms. Casady after her physical capacities evaluation, and they provide more guidance since they are much more detailed than Ms. Casady's recommendations. Thus, I find that the Claimant can lift 21-50 pounds occasionally, cannot lift anything over 50 pounds, can occasionally push/pull 11-20 pounds, cannot push/pull over 20 pounds, can occasionally climb, and occasionally reach, and cannot engage in repetitive flexion and extension of his neck. Since the Claimant has reached MMI, these restrictions are permanent.

The Claimant's Ability to Perform His Former Work or Alternative Employment

The Claimant Is Unable to Perform his Former Work

As discussed above, the Claimant's medical condition has resulted in permanent restrictions on his physical activity. He can lift 21-50 pounds occasionally, cannot lift anything over 50 pounds, can occasionally push/pull 11-20 pounds, cannot push/pull over 20 pounds, can occasionally climb, and occasionally reach, and cannot engage in repetitive flexion and extension of his neck.

Dr. Remington opined that the Claimant cannot return to work as a sheetmetal mechanic. He explained that the Claimant cannot work on board a ship because it requires a lot of bending, occasionally banging his head, ducking and awkward positions that are uncomfortable for the Claimant. He stated that these were activities that the Claimant needed to avoid. (CX 25A, p. 14.) He also testified he disagreed with Dr. Zietak's opinion that the Claimant could perform his sheet metal mechanic duties with no restrictions. He explained that the Claimant could not perform those duties because he has a problem with his neck that puts limits on lifting and repetitive use of his neck. (CX 25B, p. 5.) The job description for the Claimant's sheetmetal mechanic position states that there is an average of 2 hours and a maximum of 6 hours of overhead reaching and frequent bending, crouching and squatting. (CX 6.) These physical activities are inconsistent with the limitations on the Claimant's physical activity. Moreover, the sheetmetal mechanic position had lifting requirements that exceeded the Claimant's physical restrictions. As noted by Dr. Remington, the lifting and overhead reaching requirements of the job exceeded the Claimant's physical activity limitations. (CX 25B, p. 5.)

Mr. Jackson, the Claimant's former foreman, testified at his deposition that sheetmetal mechanics are supposed to use riggers to help lift anything that weighs more than 50 pounds and that tool boxes seldom weigh as much as 70 pounds, but he acknowledged that the tool boxes usually weigh 40 pounds. (CX 27, pp. 13-14.) He acknowledged, however, that the tool boxes have to be carried "quite a distance" (CX 27, p. 14) and that at the Bremerton Shipyard where the Claimant worked, it is ¼ mile from the parking lot to the shipyard, and once the mechanic gets into the shipyard, the shipyard is 4-5 miles long, and the walking distance will depend on the location of the ship. (CX 27, pp. 14-15.) Mr. Jackson also agreed that there is a lot of overhead work (CX 27, p. 15), which the Claimant's medical condition precludes him from performing.

In contrast to Dr. Remington's opinion, Dr. Zietak opined that the Claimant could return to his former job as a sheetmetal mechanic with no restrictions, except possibly a 50 pound lifting limitation. Her opinion is entitled to no weight whatsoever. She had no credible basis for rendering an opinion as to the Claimant's ability to work as a sheetmetal mechanic. She based her opinion an appalling dearth of information about the Claimant's duties and job requirements. She did not know what kind of mechanic or supervisor he was, and she didn't ask for more specific information when he merely said he was a mechanic at Todd Shipyard. (HT, pp. 56, 57.) She never reviewed any job analysis or job qualifications concerning the Claimant's job (HT, p. 56), and she admitted that she didn't even know if his duties required him to perform tasks other than the one he was performing at the time he was injured. (HT, p. 57.)

She admitted that she had no independent knowledge of what the Claimant's job entailed, other than what he said he was doing at the time of his injury, but she didn't even bother to ask him what his other duties were. (HT, p. 56.) She had no knowledge as to the lifting or overhead reaching requirements for the Claimant's job as a mechanic, nor did she know the lifting or overhead reaching requirements for his job as a supervisor. (HT, p. 59.) Despite admitting that she did not know the requirements for his job as a mechanic or as a supervisor, and acknowledging that a 50-pound lifting restriction is recommended for patients, like the Claimant, who have undergone a spinal fusion, Dr. Zietak still expressed the opinion that the Claimant could return to his former work. (HT pp. 54, 59.) The fallacy of her opinion is glaringly apparent since job description for the Claimant's sheetmetal position requires occasional lifting of an average of 65 pounds and as much as 120 pounds and the ability to occasionally carry tool boxes that weigh an average of 65 pounds but as much as 120 pounds. (CX 6.)

Additionally, Dr. Zietak lacked credibility. She testified on re-direct examination that she had observed sheetmetal mechanics at work at Todd Shipyards (HT, p. 73), and that she had Todd Shipyards in mind when she said the Claimant could return to his former job with no restrictions (HT, p. 74), yet on re-cross-examination, she admitted that she did not know what a sheetmetal mechanic did and that she didn't even know if she had ever observed sheetmetal mechanics working at Todd Shipyard. (HT, p. 75.)

I find, therefore, that the Claimant is unable to perform his former duties as a sheetmetal mechanic.

The Claimant Is Able to Work in Suitable Alternate Employment

Once a claimant establishes that after an injury, he is unable to do his usual work, he has established a *prima facie* case of total disability and the burden shifts to the employer to establish the availability of suitable alternative employment that the claimant is capable of performing. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980); *Hairston v. Todd Shipyard Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1032 (5th Cir. 1981); *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). To meet this burden, the employer must show the existence of realistic job opportunities the claimant is capable of performing, considering the claimant's age, education, work experience, and physical and mental restrictions. *New Orleans (Gulfwide) Stevedores v. Turner* , 661 F.2d 1031, 1042-43 (5th Cir. 1981). If the employer satisfies its burden, then the

claimant may be found partially disabled at most. *See, e.g., Container Stevedoring Co. v. Director OWCP*, 935 F.2d 1544 (9th Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986).

At the Respondents' request, the Claimant met with a vocational consultant, John Berg, some time before January 2003. (HT, p. 121.) In January 2003, Mr. Berg identified five auto parts clerk positions that he indicated the Claimant would qualify for. (HT, p. 122; EX 4.) Copies of the labor market survey reports identifying the five positions were provided to the Claimant in early 2003. (HT, pp. 121-22.) One of the auto parts clerk positions offered a $7.00 to $8.00 per hour entry level wage and a wage of $8.50 to $12.00 per hour for experienced applicants. (EX 4, p. 12.) The remaining four positions offered a starting wage of $8.00 per hour with the exact wage dependent on the applicant's experience. (EX 4, pp. 13-16.) Shortly after he received a copy of the labor market surveys that Mr. Berg prepared, the Claimant contacted three of the five businesses identified in Mr. Berg's surveys and was told that they were not hiring at that time, but they would be hiring in the near future. (HT, pp. 122; 145-46.) The Claimant was still working for the Employer at the time he made the inquiries, so he was unable to tell these businesses when he would be available for employment. (HT, p. 122.)

The Claimant underwent a vocational assessment in the office of Kathryn Reid, a rehabilitation counselor, on January 12, 2004. Ms. Reid reported that she reviewed the various medical and vocational records pertaining to the Claimant, and she agreed with Mr. Berg that the Claimant could work as a parts clerk. (CX 24, pp. 277-78.) She also had an employee re-contact the employers identified in Mr. Berg's 2003 surveys about the availability of jobs identified in the surveys and the specific physical requirements for the positions. She reported that two of the employers had lifting requirements that exceeded the Claimant's restrictions. Two other employers had positions that did not exceed the Claimant's weight lifting limitations. Neither employer was hiring in January 2004, but one anticipated openings coming up, and the other was continuously taking applications. (CX 24, p. 279.)

On January 23, 2004, the Claimant was evaluated by Kent Shafer, a certified vocational rehabilitation counselor. (HT, p. 155.) After reviewing a variety of medical records, Mr. Berg's labor market surveys, the PCE, and the Claimant's sheetmetal mechanic job description, Mr. Shafer also agreed with Mr. Berg's conclusion that the Claimant could work as an auto parts clerk. (HT, pp. 156, 158.) Mr. Shafer expressed the opinion that the wages identified in Mr. Berg's labor market survey analysis were representative of what the wages would be in the workforce in 2003. (HT, p. 160.) He also expressed the opinion that the Claimant would be very competitive for those jobs because of his past experience and training and that the Claimant would probably be able to find a job within 30 days after he started his search because these jobs are available on a reasonably continuous basis. (HT, pp. 164-65.)

After considering this evidence, I find that the Claimant is able to work in suitable alternate employment as an auto parts clerk. The Claimant did not need alternate work until he was laid off from his quality control inspector job on February 20, 2004. Respondents have not provided evidence as to the availability of specific auto parts clerk positions at the time the Claimant was laid off. However, the Claimant's own vocational consultant expressed the opinion these jobs are available on a reasonably continuous basis and that the Claimant should be

able to find an auto parts clerk job within about 30 days. Thus, I find that suitable alternate employment would have been available to the Claimant on March 21, 2004.

The Claimant's Average Weekly Wage

Sections 10(a), 10(b) and 10(c) of the Longshore Act set forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage ("AWW"). 33 U.S.C. § 910. The first method, found in Section 10(a), applies to an employee who has worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury. *Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158 (1986). "Substantially the whole of the year" refers to the nature of a claimant's employment, *i.e.*, whether it is intermittent or permanent, *Eleazar v. General Dynamics Corp.*, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 workdays of that year, *O'Connor v. Jeffboat, Inc.*, 8 BRBS 290, 292 (1978).

Where Section 10(a) is inapplicable, application of Section 10(b) must be explored before resorting to application of Section 10(c). *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), *rev'g* 8 BRBS 692 (1978). Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year" (within the meaning of Section 10(a)), prior to his injury. 33 U.S.C. §§ 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1342 (9th Cir. 1982), *vac'd in part on other grounds*, 462 U.S. 1101 (1983); *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133, 136 (1990); *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153 (1979).

Whenever Sections 10(a) and (b) cannot "reasonably and fairly be applied," Section 10 (c) is applied. *See National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979); *Gilliam v. Addison Crane Company*, 21 BRBS 91, 93 (1987). More specifically, the use of Section 10(c) is appropriate when Section 10(a) is inapplicable and the evidence is insufficient to apply Section 10(b). *See generally Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 237 (1985); *Cioffi v. Bethlehem Steel Corp.*, 15 BRBS 201 (1982); *Holmes v. Tampa Ship Repair and Dry Dock Co.*, 8 BRBS 455 (1978); *McDonough v. General Dynamics Corp.*, 8 BRBS 303 (1978). Section 10(c) mandates that a sum which "shall reasonably represent the … earning capacity of the injured employee" be determined.

In this case, 10(a) does not apply because there is insufficient information in the record to determine the Claimant's average daily wage, which is required to complete the average weekly wage under 10(a). *Todd Shipyards v. OWCP*, 545 F.2d 1176, 1179 (9th Cir. 1976); *Sproull v. Stevedoring Services of America*, 25 BRBS 100, 104 (1991). There is also no information to use as the basis for a 10(b) calculation.

The parties are in agreement that 10(c) is the appropriate section for computing the Claimant's average weekly wage, but they disagree as to the figures to use for arriving at the average weekly wage.

The Claimant's earnings history, as determined by his payroll records, CX 3, is as follows:

4/30/00 – 4/27/01 (52 weeks before injury)	$25,486.33
2000 (worked 46 weeks)	$31,694.70
1999 (worked 38 weeks)	$19,492.03
1998 (worked 48 weeks)	$38,044.32
1997 (worked 44 weeks)	$35,512.58

The Claimant worked only during 36[8] of the 52 weeks preceding his injury.

Respondents argue that the Claimant's wages for the 52 weeks preceding his injury should be used to calculate the Claimant's average weekly wage. They acknowledge that he did not work the entire 52 weeks but argue that the 52-week earnings should be divided by 52 because the non-work weeks were attributed to periods of layoff, which often occur in the shipbuilding industry and should be a factor in calculating his wage earning capacity.

The Claimant, on the other hand, argues that $25,486.33 is not representative of his annual earning capacity and that his 1998 earnings should be used as being more representative of his earning capacity. In the alternative, he contends the average of his earnings for 1998, 1999 and 2000, which is $29,743.68, should be used.

The main purpose of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of his injury. *Flanagan Stevedores v. Gallagher*, 219 F.3d 426, 433 (5th Cir. 2000); *Palacios v. Campbell Industries*, 633 F.2d at 843; *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). The administrative law judge has broad discretion in determining a claimant's annual earning capacity under Section 10(c). *See Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979); *Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999); *Fox v. West State Inc.,* 31 BRBS 118 (1997).

Determining the Claimant's average weekly wage in this case is not easy. The shipbuilding industry no longer provides full-time steady work. By its nature, there are periods when a worker will be laid off due to lack of work. The Claimant specifically acknowledged this trend at the hearing, and he acknowledged having been laid off at times during the years before his injury. (HT, pp. 123-24, 136.) It is also reflect in his payroll records, CX 3, which show that he often did not work a 40-hour week.

The computed average weekly wage should take into consideration the trend towards decreasing availability of work. *Gilliam v. Addison Crane Co.*, 21 BRBS 91, 93 (1987); *Lozupone v. Stephano Lozupone & Sons*, 14 BRBS 462, 465 (1981). However, while I agree that calculation of the Claimant's average weekly wage should take into consideration the fact that he will not always be able to work a full year, I am not persuaded that the appropriate calculation method to use in this case is to divide his earnings from the 52 weeks before his injury by 52.

[8] Respondents state that he worked 39 weeks, but they apparently counted 3 weeks during which he was paid but worked no hours.

As noted above, during the 52-week period before his injury, the Claimant worked only 36 weeks. During the calendar years from 1997 through 2000, with the exception of 1999,[9] the Claimant, even with layoffs and injuries, worked 44 to 48 weeks. While the availability of work in the shipbuilding industry may be declining, I am not persuaded that the drop is so dramatic that available work has dropped to 36 weeks per year. It appears from the Claimant's payroll records that during the 52 weeks before his injury, the Claimant was laid off for over 3 months from mid January 2001 to April 2001. (CX 3, p. 4.) There were no similar lengthy payroll gaps during 1997, 1998 or 2000. Moreover, while there is a large payroll gap in 2001 after the Claimant's injury, it is attributed to his injury, and not lack of work. The testimony establishes that but for his injury, he would have continued to work after February 2004 because of his seniority. Thus, I am rejecting Respondents' implicit argument that the Claimant's 36 weeks of work in the 52 weeks preceding his injury is reflective of the work availability at the time of his injury, and I am rejecting Respondents' suggestion that the Claimant's average weekly wage should be calculated by dividing his 52-week earnings by 52.

I am similarly not persuaded by the Claimant's argument that I should use the 1998 earnings to compute his average weekly wage. That was a peak earning year for him, and with the acknowledgement that the availability of work in the shipbuilding industry is declining, that would not provide an accurate estimate of the Claimant's wage earning capability 2 ½ years later in April 2001 when he was injured.

I also am not persuaded that the gross earnings to use in the AWW calculation should be an average of the Claimant's earnings for 1998, 1999, and 2000. The Claimant missed substantial periods of work in 1999 because of two separate injuries, as well as being laid off. (HT, pp. 124, 125, 139.) The case law is very clear that when using 10(c) to compute an average weekly wage, the ALJ can include wages a claimant would have earned but for non-recurring events such as a personal illness, a union strike, or another injury. *See Flanagan Stevedores v. Gallagher*, 219 F.3d 426, 434 (5th Cir. 2000); *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 219 (1991). There is insufficient information in the record to determine what the Claimant's earnings would have been in 1999 if he had not been injured, so it would be inappropriate to use his 1999 earnings to calculate his average weekly wage.

After carefully considering the parties' arguments in support of their respective positions, I have concluded that the most fair and accurate assessment of the amount of money that the Claimant would have had the potential and opportunity to earn at the time of his injury would be to use his earnings during the calendar year 2000. He worked 46 weeks in that calendar year and earned $31,694.70. He missed 4 weeks work due to surgery for a shoulder injury. (HT, pp. 139-40.) Those 4 weeks should be excluded from the computation of his average weekly wage since he would have been able to earn wages during those 4 weeks if he had not been injured. *Flanagan*, 219 F.3d at 434. Thus, I find that the Claimant's average weekly wage at the time of his injury was $660.31 ($31,694.70 divided by 48 weeks).

[9] The Claimant worked an unusually low number of weeks in 1999 due to two separate injuries, as well as layoffs.

The Claimant's Wage Earning Capacity

Having found that there was suitable alternate employment for the Claimant after he was laid off, I must now determine what his wage earning capacity would have been in the alternate employment. Most of the employers in Mr. Berg's labor market survey identified the auto parts clerk jobs as having a wage rate that started at $8.00 per hour. Mr. Berg did not identify the upper wage range for those employers. One employer, Napa Auto Parts, identified the wage range for an experienced auto parts clerk as being $8.50 to $12.00 per hour.

Respondents argue that with his experience, the Claimant would be likely to start at the high end of the hourly rate. (Todd/Eagle (Seabright's) Post-Hearing Brief, p. 11.) Claimant, on the other hand, argues that with his age, his lack of computer skills, and the fact that he has been away from the auto parts industry for years, he would probably start at $8.00 per hour. (Claimant's Post Trial Brief, p. 7.)

It is unlikely that with his work experience and his experience in the auto parts industry the Claimant would start at the lowest hourly rate of $8.00. However, the Claimant has not worked in the auto parts industry since about 1988 (HT, p. 87), and as noted by Ms. Reid in her report, two of the employers who were contacted indicated that use of computers is part of the job. (CX 24, p. 279.) The Claimant has no computer skills. Thus, it is also unlikely that he would start at $12 per hour. Moreover, only one employer identified a range that hit $12 per hour. (EX 4, p. 12.) Ms. Reid expressed the opinion that the Claimant would probably start at $8.50 per hour. (CX 24, p. 280.) I agree with her. Thus, I find that the suitable alternate employment for the Claimant would have paid him at a rate of $8.50 per hour in 2003.

However, the Claimant's wage earning capacity must be determined based on what it would have been in 2001. Obviously, wages were higher in 2003. Mr. Shafer testified that he extrapolated the 2003 hourly wages back to what they would have been in 2001 by using the increase in the national average weekly wage for those two years to calculate the inflation rate between 2001 and 2003. (HT, p. 163.) He testified that factoring out the rate of inflation, the 2003 $8.00 hourly rate would have been $7.04 in 2001. (HT, p. 163.)

While Mr. Shafer's approach was correct, his calculation appears to be wrong. The Employment Standards Division of the U.S. Department of Labor identifies the National Average Weekly Wage for the period that includes April 2001 to be $466.91. The National Average Weekly Wage for January 2003, when Mr. Berg did his labor market survey, was $498.27. This calculates out to be a 6.72% increase from 2001 to 2003. Mr. Shafer's $7.04 adjusted hourly rate would require an inflation rate of 13.6% to generate an hourly rate of $8.00 in 2003. Using the 2003 $8.50 hourly rate that I find the Claimant would have been paid, I calculate the adjusted 2001 hourly rate to be $7.96.[10]

Applying this adjusted hourly rate to the Claimant, I find the Claimant had a wage earning capacity of $318.40 ($7.96 x 40 hours/week) at the time he was injured.

[10] Applying algebra concepts, the formula for determining the 2001 hourly rate is as follows:
2001 hourly rate = 2004 hourly rate/(1 + calculated rate of inflation)

Benefits Awarded to the Claimant

The Claimant is entitled to temporary total disability benefits based on an average weekly wage of $660.31 for those periods when he was unable to work between April 27, 2001, the date of his injury, and June 6, 2002, when he reached maximum medical improvement. He is entitled to permanent partial disability benefits based on a retained earning capacity of $318.40 for any period between June 6, 2002, and February 20, 2004, when he was laid off. He is entitled to permanent total disability for the period between February 20, 2004, and March 21, 2004, when he presumably would have been able to find employment as an auto parts clerk, and he is entitled to permanent partial disability benefits after March 21, 2004.

The Claimant has already been paid temporary total disability benefits based on an average weekly wage of $490.12 for various periods after his injury. However, the parties have provided conflicting information about the benefits that have been paid to the Claimant and should resolve the discrepancies with the District Director[11] when the actual calculations are made.

The Claimant's Entitlement to Section 14(e) Penalties

Section 14(e) of the Act provides:

> (e) If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

33 U.S.C. § 914(e). In order to escape a penalty under Section 14(e), an employer must pay compensation, controvert liability, or show irreparable injury. *Frisco v. Perini Corp., Marine Div.,* 14 BRBS 798, 800 (1981).

When a dispute arises over the amount of compensation due, even if some compensation has been voluntarily paid, the employer is required to file a notice of controversion if it chooses not to pay the compensation sought. *See National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979); *Daniele v. Bromfield Corp*., 11 BRBS 801 (1980); *Devillier v. National Steel & Shipbuilding Co.,* 10 BRBS 649 (1979). The employer's liability for the Section 14(e)

[11] For example, the Claimant's records show no payment for the period between July 25, 2001, and August 8, 2001, CX 4, pp. 17-34, but Respondents' LS-208, EX 1, claims that payments were made with no break between May 17, 2001, and September 5, 2001. The Claimant's records show temporary total benefits were paid for the period from October 16, through October 31, 2001, CX 4, p. 24, yet Respondents' LS-208 shows that no payments at all were made for that period.

penalty terminates with its filing of a notice of controversion. *Scott v. Tug Mate, Inc.,* 22 BRBS 164, 169 (1989).

Respondents state in their LS-208, EX 1, that they stopped paying permanent partial disability benefits to the Claimant on June 4, 2003, when he returned to work. On the same day, they filed a Notice of Controversion, LS-207, stating that they were controverting his claim for benefits because he had returned to work. (CX 1.)

There is no dispute that the Claimant returned to work and that he worked until he was laid off on February 20, 2004. However, Respondents did not resume payment of benefits when he was laid off on February 20, 2004, nor did they file a LS-207 controverting the Claimant's right to benefits when he was laid off even though one of the layoff notices issued in connection with his layoff, CX 5, specifically said that he was being laid off because of his "inability to perform duties due to industrial injury."

The statement that the Claimant was laid off because of his "inability to perform duties due to industrial injury" is a tacit admission that the Claimant's absence from work was due to a work-related injury. As a result, the Claimant was entitled to have payment of his disability benefits resume. In order to escape Section 14(e) liability, an employer has to file a notice of controversion within 14 days of becoming aware of a dispute. *See National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979); *see also DeRobertis v. Oceanic Container Service, Inc.,* 14 BRBS 284 (1981). Since Respondents were aware that the Claimant's layoff was due to his work-related injury, it was incumbent on them to either begin his benefits or to file a notice of controversion. There is no evidence that Respondents ever filed a notice of controversion after the Claimant was laid off.

Thus, I find the Claimant is entitled to penalties under Section 14(e) beginning February 20, 2004, when he was laid off. An employer's Section 14(e) liability ceases on the date of the filing of the notice of controversion or on the date of the informal conference, whichever comes first. *National Steel & Shipbuilding Co. v. U.S. Dept. of Labor*, 606 F.2d 875, 880, 11 BRBS 68, 71 (9th Cir. 1979), *aff'g in part and rev'g in part Holston v. National Steel & Shipbuilding Co.,* 5 BRBS 794 (1977). Since no such notice was filed in this case, Respondents' liability for the Section 14(e) penalties will end on the date of the informal conference in this case.[12]

The Employer's Entitlement to Section 8(f) Relief

The Employer filed an application seeking relief under Section 8(f) of the Longshore Act in the event permanent disability benefits were awarded to the Claimant. The purpose behind the 8(f) Special Relief Fund is to remove the disincentive to employ people who suffer from a pre-existing condition that could make them more susceptible to injuries on the job. *See Director, OWCP v. Newport News Shipbldg. & Dry Dock Co.* (*Carmines*)*,* 138 F.3d 134, 138 (4th Cir. 1998). If an employer meets the requirements for Section 8(f) of the Act, it may limit its liability for payment of permanent disability to 104 weeks compensation. 33 U.S.C. § 908(f).

[12] The record in this case does not include any information as to when the informal conference was held. Thus, the determination of the actual ending date for the penalties will be left to the District Director to determine.

Under Section 8(f) of the Longshore Act, an employer may limit its liability for payment of permanent disability to 104 weeks compensation if three elements are present:

(1) The injured worker had an existing permanent partial disability before the most recent injury;

(2) The injured worker's existing permanent partial disability was manifest to the employer before the most recent injury; and

(3) The present permanent disability, if total, is not due solely to the most recent injury or the present permanent disability, if partial, is materially and substantially greater than that which would have resulted from the most recent injury alone without the contribution of the pre-existing permanent partial disability.

33 U.S.C. § 908(f); *see Marine Power & Equipment v. Department of Labor (Quan)*, 33 BRBS 204 (CRT) (9th Cir. 2000); *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991).

Counsel for the Director informed me in his June 17, 2004, post-trial statement that after reviewing the exhibits submitted by the Respondents, the Director's position is that if the Claimant receives a permanent disability award, the Respondents are entitled to Special Fund relief. Since I have determined that the Claimant is entitled to a permanent partial disability award, there is no need to discuss Respondents' entitlement to Section 8(f) relief.

Accordingly, Respondents' application for Section 8(f) relief is GRANTED.

CONCLUSION

The Claimant suffers from cervical spondylosis and left upper extremity radiculopathy as a result of his April 27, 2001, injury. He reached maximum medical improvement on June 6, 2002. The Claimant's condition is permanent and renders him unable to return to his former work as a sheetmetal mechanic. However, the Claimant is able to perform alternative work as an auto parts clerk, and has a wage earning capacity of $318.40. He is entitled to temporary total, permanent total, and permanent partial disability benefits as set forth above based on an average weekly wage of $660.31. The Claimant is entitled to Section 14(e) penalties for the benefits that were owed to him after February 20, 2004. Respondent is entitled to relief under Section 8(f) of the Longshore Act.

ORDER

Based on the findings and conclusions set forth above, it is hereby ORDERED that:

1. Todd Shipyard Corporation and Eagle Pacific Insurance Company shall make payments to the Claimant for temporary total disability benefits for those periods from April 27, 2001, through June 5, 2002, when the Claimant did not work, based on an average weekly wage of $660.31.

2. Todd Shipyard Corporation and Eagle Pacific Insurance shall make payments to the Claimant for permanent partial disability benefits between June 6, 2002, and February

19, 2004, for any period between those dates when he was laid off based on a wage earning capacity of $318.40.

3. Todd Shipyard Corporation and Eagle Pacific Insurance Company shall make payments to the Claimant for permanent total disability benefits beginning February 20, 2004, and ending March 21, 2004, based on an average weekly wage of $660.31.

4. Todd Shipyard Corporation and Eagle Pacific Insurance Company shall pay interest to the Claimant on any past due compensation payments as determined by the District Director.

5. Todd Shipyard Corporation and Eagle Pacific Insurance Company shall receive credit for any disability compensation benefits previously paid to the Claimant for this claim.

6. Todd Shipyard Corporation and Eagle Pacific Insurance Company shall pay Section 14(e) penalties for the benefits owed to the Claimant from February 20, 2004, until the date of the Informal Conference.

7. The District Director shall make all calculations necessary to carry out this Order.

8. Counsel for the Claimant shall prepare and serve an Initial Petition for Fees and Costs on the undersigned and on the Respondents' counsel within 20 calendar days after the service of this Decision and Order by the District Director. Within 20 calendar days after service of the fee petition, Respondents' counsel shall initiate a verbal discussion with the Claimant's counsel in an effort to amicably resolve any dispute concerning the amounts requested. If the two counsel agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the counsel fail to amicably resolve all of their disputes, the Claimant's counsel shall, within 30 calendar days after the date of service of the initial fee petition, provide the undersigned and the Respondents' counsel with a Final Application for Fees and Costs which shall incorporate any changes agreed to during his discussions with the Respondents' Counsel and shall set forth in the Final Application the final amounts he requests as fees and costs. Within 14 calendar days after service of the Final Application, the Respondents' Counsel shall file and serve a Statement of Final Objections. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed.

9. The parties are ordered to notify this Office immediately upon the filing of an appeal.

A

JENNIFER GEE
Administrative Law Judge